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Nos. 89-556, 89-557, and 89-771

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA, APPELLANT

v.

UNITED STATES OF AMERICA

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, APPELLANT

v.

UNITED STATES OF AMERICA

STATE OF LOUISIANA, EX REL. CHARLES E. "BUDDY" ROEMER, III, ET AL., GOVERNOR OF LOUISIANA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS

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QUESTION PRESENTED

Whether the action filed by the United States against the State of Louisiana and others required the convening of a three-judge district court under 28 U.S.C. 2281 (1970) (repealed 1976), thereby vesting this Court with appellate jurisdiction under 28 U.S.C. 1253.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	3
Argument	14
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Ayers v. *Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987) appeal pending, No. 88-4103 (5th Cir.)	20
Bailey v. *Patterson*, 369 U.S. 31 (1962)	18
Bazemore v. *Friday*, 478 U.S. 385 (1986)	8
Brown v. *Board of Educ.*, 347 U.S. 483 (1954)	6
Costello v. *Wainwright*, 430 U.S. 325 (1977)	15
Geier v. *University of Tennessee*, 597 F.2d 1056 (6th Cir.), cert. denied, 444 U.S. 886 (1979)	19
Goosby v. *Osser*, 409 U.S. 512 (1973)	17-18
Lewis v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980)	3
Morales v. *Turman*:	
535 F.2d 864 (5th Cir. 1976)	16
430 U.S. 322 (1977)	15, 16, 17, 18
Norton v. *Mathews*, 427 U.S. 524 (1976)	14
Sands v. *Wainwright*, 491 F.2d 417 (5th Cir. 1973), cert. denied, 416 U.S. 992 (1974)	15
United States v. *Alabama*, 828 F.2d 1532 (11th Cir. 1987), cert. denied, 108 S. Ct. 2857 (1988)	19
Weinberger v. *Salfi*, 422 U.S. 749 (1975)	14

Constitution, statutes, and rule:

U.S. Const. Amend. XIV	2, 17
La Const. of 1974, Art. 8, §§ 5-7	3

Statutes and rule – Continued: Page

Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119:
§ 1, 90 Stat. 1119 3
§ 7, 90 Stat. 1120 3
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.* 2
28 U.S.C. 1253 ..... 2, 14, 15, 19
28 U.S.C. 1404(a) 4
28 U.S.C. 2281 (1970) 3, 14, 15, 16, 17, 19
28 U.S.C. 2284 (1982 & Supp. V 1987) 3
Fed. R. Civ. P. 53 10

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-556

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA, APPELLANT

v.

UNITED STATES OF AMERICA

No. 89-557

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, APPELLANT

v.

UNITED STATES OF AMERICA

No. 89-771

STATE OF LOUISIANA, EX REL. CHARLES E. "BUDDY" ROEMER, III, ET AL., GOVERNOR OF LOUISIANA, APPELLANTS

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UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS

OPINIONS BELOW

The opinion of the district court (J.S. App. 3a-38a) is reported at 692 F. Supp. 642.[1] The opinion of the district

[1] "J.S. App." refers to the joint appendix to the jurisdictional statements in Nos. 89-556 and 89-557, unless otherwise indicated.

court approving the remedial plan (J.S. App. 39a-77a) is reported at 718 F. Supp. 499. The opinion of the district court on motions to alter or amend the judgment (J.S. App. 81a-104a) is reported at 718 F. Supp. 525. The opinion of the district court on motions to stay, together with its supplemental order (J.S. App. 78a-80a, 105a-108a), are reported at 718 F. Supp. 521.

JURISDICTION

The judgment of the district court was entered on August 4, 1989. J.S. App. 78a-80a. The notices of appeal in Nos. 89-556 and 89-557 were each filed on August 10, 1989. J.S. App. 1157a-1160a, 1161a-1163a. The notice of appeal in No. 89-771 was filed on September 29, 1989. 89-771 J.S. App. 210a-212a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[2] For the reasons stated, see pp. 14-19, *infra*, this Court lacks jurisdiction over these appeals.

STATEMENT

1. a. In 1974, after the United States Department of Health, Education, and Welfare had notified the State of Louisiana that, in the Department's view, it was operating a racially segregated system of higher public education, the Attorney General of the United States filed this action in the Middle District of Louisiana under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and the Fourteenth Amendment. The complaint named the State

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[2] Section 1253 provides in pertinent part that

> any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

and the State's several boards of higher education as defendants. As relief, the United States sought an order enjoining the defendants from maintaining the State's segregated system and an order requiring them "to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana." J.S. App. 163a; see *id.* at 9a-10a.

Along with the complaint, the United States filed a formal request that the district court convene a three-judge court under 28 U.S.C. 2281 (1970) (repealed 1976) and 28 U.S.C. 2284.[3] See J.S. App. 184a-196a. That request was granted in March 1974. See *id.* at 197a-198a. After the restructuring of the State's higher education boards in 1976,[4] the parties jointly moved to substitute the following

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[3] 28 U.S.C. 2281 (1970) provided in pertinent part:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute * * * shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Congress, by the Act of Aug. 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119, repealed 28 U.S.C. 2281. That repeal does not affect this case because the complaint was filed before the repeal's effective date, August 12, 1976. See Act of Aug. 12, 1976, Pub. L. No. 94-381, § 7, 90 Stat. 1120; see also *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 29 n.1 (1980).

[4] In 1974, Louisiana established the current four-board system for governing the State's public colleges and universities. See La. Const. of 1974, Art. 8, §§ 5-7. The Board of Regents "has general responsibility for planning, coordinating and reviewing the budgets and academic program offerings of each state university." J.S. App. 40a. The remaining three boards, the Board of Supervisors of Southern

defendants: appellant Board of Regents, appellant Board of Supervisors of Southern University and Agricultural and Mechanical College (Southern Board), appellant Board of Trustees for State Colleges and Universities (State College Board), and appellant Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (LSU Board). *Id.* at 10a.[5]

In August 1980, the district court, with the parties' consent, transferred the case to the Eastern District of Louisiana under 28 U.S.C. 1404(a). Trial was scheduled for September 1981. J.S. App. 10a.

University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, each have "direct management authority for a number of" those state schools. *Ibid.*

The Board of Supervisors of Southern University oversees the following Southern University campuses – Southern at Baton Rouge, Southern at New Orleans, and Southern at Shreveport/Bossier City. The Board of Trustees for State Colleges and Universities oversees the following state schools – Louisiana Tech, Grambling State, University of Southwestern Louisiana, Northeast Louisiana, Northwestern State, Southeastern State, McNeese State, Nicholls State, and Delgado Community College. The Louisiana State University Board of Supervisors overseas the LSU system of colleges, including LSU at Baton Rouge, LSU at Shreveport, LSU at Alexandria, LSU at Eunice, and the University of New Orleans. See J.S. App. 40a-41a.

[5] In No. 89-556, the Attorney General of the State of Louisiana has filed a jurisdictional statement on behalf of defendant/appellant State of Louisiana. In No. 89-557, the Southern Board has filed its own jurisdictional statement. And in No. 89-771, the Governor of the State of Louisiana has filed a jurisdictional statement on behalf of the following defendants/appellants: the State, the Board of Regents, the State College Board, and the LSU Board. We will refer to the jurisdictional statement in No. 89-556 as "Att'y Gen. J.S.," the jurisdictional statement in No. 89-557 as "Southern J.S.," and the jurisdictional statement in No. 89-771 as "Gov. J.S."

5. In anticipation of trial, the parties developed a comprehensive record. The record showed that the State had segregated its colleges "[u]p to at least 1954" and continued the schools' racial exclusivity through the mid-1960s. J.S. App. 5a. Although the State had implemented an "open admissions" policy that permitted students of both races to attend all schools, the student enrollment and faculty employment pattern of Louisiana's colleges, as of 1973, remained segregated:[6]

School	% black students	% black faculty
historically white schools		
LSU system	7.7	1.6
Louisiana Tech. Univ.	6.2	0.0
McNeese State	8.4	0.5
Nicholls State Univ.	5.5	2.1
Northeast Louisiana Univ.	9.3	1.7
Northwestern Louisiana Univ.	10.2	1.6
Southeastern Louisiana Univ.	4.2	0.7
Univ. of Southwestern Louisiana	8.3	3.2
historically black schools		
Southern Univ. system	99.3	87.2
Grambling State	99.1	77.7

See J.S. App. 164a-165a.

Depositions were also taken of experts who had considered the effect of the State's dual system on educational concerns such as academic offerings, physical facilities, and apportionment of resources among the various state

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[6] The record also showed that, as of 1981, the membership of appellants LSU Board and State College Board was predominantly white, while that of appellant Southern Board was predominantly black. J.S. App. 44a

schools. Those experts concluded that the State, together with appellant Boards, had created the following inequalities under the dual system they had perpetuated: (1) historically white colleges received more desirable and better conditioned physical facilities than historically black colleges; (2) historically white colleges obtained superior and more diverse academic programs than historically black colleges;[7] and (3) current financial assistance formulas maintained, and did not eliminate, the unequal effect of past funding deficits at historically black colleges.[8]

In other words, segregation in Louisiana's higher education accomplished not only the separation of students by race, but also created inequalities in educational opportunities. Those inequalities, together with the proximate placement of black and white schools with overlapping curricula, continued the racial identifiability of the State's schools, and discouraged white students from attending the traditionally black schools, even after the State abolished formal segregation in the wake of *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). See, *e.g.*, J.S. App. 44a, 670a, 689a.

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[7] In this regard, one expert noted that the academic offerings at white colleges located near historically black schools were not only better, but also duplicated the course offerings at those black schools. See C. Conrad, Louisiana Curriculum Analysis (Mar. 30, 1981), filed with Deposition of Clifton F. Conrad (Apr. 13, 1981).

[8] See generally C. Conrad, Louisiana Curriculum Analysis (Mar. 30, 1981), filed with Deposition of Clifton F. Conrad (Apr. 13, 1981); H. Kaiser, Facilities Evaluation of Eight Institutions of Higher Education of the State of Louisiana (Mar. 10, 1981), filed with Deposition of Harvey Kaiser (Apr. 7, 1981) and Affidavit of Harvey Kaiser (May 6, 1988); L. Leslie, The Financial Conditions of Historically Black and Comparable Louisiana Institutions of Higher Education (Mar. 23, 1981), filed with Affidavit of Larry L. Leslie (May 9, 1988).

2. a. After extensive briefing and lengthy pretrial conferences, the United States and appellants entered into a consent decree. The district court approved the decree in September 1981, concluding that it "embodies a reasonable and specific system-wide desegregation plan which promises realistically to work." J.S. App. 266a. Under the consent decree, see *id.* at 199a-255a, the State agreed to take the following remedial measures: (1) increase other-race membership on the four governing boards, appellants Board of Regents, Southern Board, State College Board, and LSU Board; (2) recruit other-race students to historically white and black schools through open admissions, increased information and recruitment campaigns, and additional student financial assistance; (3) increase faculty integration and provide educational opportunities to blacks in order to increase the number of black faculty members; and (4) increase faculty and student exchange programs and cooperative degree programs between historically white and black schools located near each other. See *id.* at 199a-220a.[9] The consent decree also committed the State to placing new academic programs at the historically black schools, *id.* at 222a-228a, as well as making significant capital improvements and increasing financial support for those schools, *id.* at 228a-231a.[10]

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[9] For example, Grambling and Louisiana Tech are located in Lincoln Parish. LSU's Baton Rouge campus is near Southern's Baton Rouge campus, as are LSU's and Southern's respective schools in New Orleans.

[10] Parts IV and V of the decree specifically provided that the decree (and the court's jurisdiction over the action) would expire on December 31, 1987, unless a party filed a motion before that date "either to seek compliance with [the decree] or to seek other relief necessarily implicating [the decree] * * *." J.S. App. 235a; see *id.* at 11a.

b. As of late 1987, six years after the decree had been entered, the student enrollment figures for the state colleges had scarcely changed. Grambling remained 98.5% black, and Southern's Baton Rouge campus remained 86% black. With two exceptions,[11] all the former historically white schools remained over 80% white. See J.S. App. 7a; see also p. 5, *supra*. The three governing boards, appellants Southern Board, LSU Board, and State College Board, also remained racially identifiable. See J.S. App. 661a; note 6, *supra*. The State had spent only $34 million of the $125 million earmarked for capital improvements, and had failed fully to fund other financial and academic aspects of the decree. See J.S. App. 364a. In these circumstances, the United States was of the view that the State and appellant Boards had not fully eliminated the vestiges of segregation. And in light of the continuing inequalities between the historically white and black schools and the proximate placement of such schools with overlapping curricula, the United States considered that students in Louisiana did not have a truly "unfettered choice" of where to attend school. See *Bazemore* v. *Friday*, 478 U.S. 385, 407 (1986).

c. In late December 1987, the United States therefore exercised its right under the consent decree and filed a motion with the district court that requested "a hearing * * * for the purpose of determining whether [appellants] have fully implemented all provisions of [the decree] and are operating the [Louisiana state] system of public higher education on a unitary basis." J.S. App. 267a. Appellant Southern Board, although aligned as a defendant in the action, joined the United States' motion, contending,

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[11] Northwestern State's student body had become 66% white; the University of New Orleans' student body had become 75% white. See J.S. App. 7a; see also p. 5, *supra*.

among other things, that the State had not fulfilled "its commitment [under the decree] to enhance predominantly black institutions," had not satisfied "the equal opportunity provisions of the decree," and had not "otherwise implemented [the decree] in good faith." *Id.* at 563a.

In lieu of an evidentiary hearing, the parties submitted "hundreds of pages of briefs and exhibits," and filed cross-motions for summary judgment on the issue of liability. J.S. App. 4a.

3. In August 1988, the district court held that appellants were continuing to operate "an unlawful, dual system of public higher education in violation of Title VI." J.S. App. 4a. The court found that the State, through the supervision of appellant Board of Regents and each of the other appellants, operates 20 institutions. Four institutions "that were originally established as 'black schools' [including Southern] * * * remain predominantly black"; the eleven institutions "that were originally established as 'white schools' * * * remain predominantly, and disproportionately, white." *Id.* at 5a, 6a. The court noted that the other four schools "are all predominantly, and disproportionately, white." *Id.* at 6a. The court also found that "[t]he four board[s] governing these twenty schools suffer from similar racial identifiability. The Southern Board remains over three-fourths black, while the other three boards are between 70% and 80% white." *Id.* at 9a. Thus, the court fully accepted appellant Board of Regents' concession that "the racial identifiability of Louisiana's public colleges and universities persists today is . . . undisputed." *Ibid.*

Turning to the merits of the controversy, the district court determined that "[i]n failing to achieve a truly unitary system at the higher level of public education, the State continues to provide polarization and separation on

a racial basis." J.S. App. 33a.[12] The court acknowledged the State's interest in fostering "freedom of choice," but concluded that

> [a]lthough the State has the authority, and should be encouraged, to promote different and unique types of higher learning institutions, the State fails when it fosters two universities or colleges in close geographic proximity offering overlapping courses and programs—especially where one is predominantly black and one is predominantly white.

Id. at 34a.

4. In December 1988, the district court appointed a special master, under Fed. R. Civ. P. 53, and charged him with the responsibility "to review the proposed [remedial] plans submitted by the parties and to conduct hearings regarding the viability of the proposed plans, and any other appropriate remedial measures." J.S. App. 626a-627a; see also *id.* at 577a-578a, 579a-581a.

In May 1989, after holding hearings and receiving submissions from the parties, the special master issued his final report. See J.S. App. 623a-715a. That report recommended detailed and comprehensive measures to overhaul the State's higher education system, including: (1) abolishing the State's current four-board structure and replacing it with a single governing board responsible for implementing and overseeing specific changes in the school system (*id.* at 652a-665a); (2) creating "campus-based advisory committees [to] help * * * maintain channels of communication between institution and board"

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[12] The court also stated that the consent decree's increased funding could not desegregate the system because that funding would neither eliminate the duplication of course offerings between proximate white and black schools, nor attract white students to the historically black schools. J.S. App. 34a-35a.

(*id.* at 665a); (3) classifying institutions ("tiering") and implementing selective admissions standards – as opposed to the then statewide policy of open admissions (*id.* at 667a-680a);[13] (4) implementing a "community college system" (*id.* at 680a-688a); (5) reducing instances of "program duplication" among schools (*id.* at 689a-691a); (6) and taking steps to desegregate LSU Law Center (short of merger with the predominantly black Southern Law Center), such as offering substantial scholarships to black students, undertaking "vigorous recruitment efforts," and setting a "10 percent category of admissions exceptions [for minority applicants]" (*id.* at 692a, 693a).

5. In July 1989, after receiving comments and objections from the parties, the district court issued an order generally accepting the special master's report and recommendations. See J.S. App. 39a-77a. With respect to the State's current four-board structure, the district court observed that "[g]iven the racially identifiable membership of the Board, none, including the Southern board which vigorously seeks to preserve its separate identity, is an exponent of racial integration." *Id.* at 44a. It then found that "[t]he present scheme for governing education in Louisiana – three operating boards and one coordinating board – has perpetuated illegal segregation in Louisiana's higher education, even though the system's creation postdates the filing of this case." *Id.* at 45a. The court therefore concluded that "[t]he system of multiple boards is * * * a defect in the state's system of higher education that violates the federal constitution." *Ibid.* Accordingly,

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[13] The report recommended establishing three separate "tiers" of schools – a flagship school (LSU), doctoral institutions (including Southern University), and comprehensive institutions (including Grambling) – with the new governing board to adopt more select admissions criteria appropriate to each "tier." See J.S. App. 667a-680a.

the court ordered that "the four boards currently governing public higher education in Louisiana shall be disbanded [within 30 days] and their powers consolidated into a single state governing board." *Id.* at 63a.[14]

Turning to problem of the effects of racial segregation on legal education in Louisiana, the district court found that "as long as the two institutions of disparate quality exist"—Southern Law Center and LSU Law Center—"the State will continue to produce a secondary class of lawyers unable to compete fully in the professional context." J.S. App. 61a. The court further found that "[g]iven the racial composition of the two schools, the negative impact of this disparity will fall largely upon the black law student population, and given the consent decree experience, a simple provision of funds will not resolve this problem, even assuming such funding is a realistic possibility."

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[14] The new board would consist of 17 voting members (and one non-voting student member); the voting members would be appointed by the Governor and confirmed by the Louisiana Senate. J.S. App. 64a-65a. In addition, the board would have "the special mission of monitoring and implementing [the court's remedial order] and of insuring that progress toward eliminating Louisiana's racially dual education system is achieved." *Id.* at 63a.

The district court, agreeing with other recommendations filed by the special master, specifically charged the new board with a variety of tasks within certain deadlines, including: developing and implementing procedures for the use of advisory committees at each school (J.S. App. 66a); implementing a scheme for classifying each school with regard to programs and admissions standards (*id.* at 66a-68a); developing selective admission requirements to replace the "traditional system of open admissions to all state universities" (*id.* at 68a); drafting a comprehensive plan for a community college system (*id.* at 70a-71a); and implementing "a system of enrollment management, program review and program transfer to address the problem of program duplication and accompanying waste of resources and segregation" (*id.* at 71a).

Ibid.[15] Accordingly, the district court did not accept the special master's recommendation to defer a merger of the two schools. Instead, the court directed the newly created board, over the next five years, to "develop a plan for merger of the two schools * * * [that] will minimize the necessary adjustment by the students, administration, and faculty and the impact of curriculum change." *Ibid.*[16]

6. On August 4, 1989, after modifiying its remedial order in certain respects, see J.S. App. 81a-99a, the district court denied motions to stay its order, see *id.* at 78a-80a.[17] On August 18, this Court stayed the district court's order pending the timely docketing and disposition of appeals then filed by the Southern Board (No. 89-557)

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[15] As the court observed, "Southern Law Center is desegregated, with a student body of 58 percent black and 42 percent white and a faculty (including part-time) which is virtually 50/50." J.S. App. 60a. LSU Law Center, on the other hand, "had a minuscule percentage of black students. During the period of the consent decree, it ranged from 1.9 percent to 0.8 percent. In 1988, it was only three percent." *Ibid.*

[16] The court also ordered the board, by the 1990-1991 school year, to "begin implementing the merger of Southern Law Center into the LSU Law Center," and specifically directed the LSU Law Center to "undertake as soon as practicable, but no later than the 1990-1991 school year, vigorous efforts for recruiting blacks, including ten percent admissions exceptions for black students, offering scholarships to prospective black students and appointing a special admissions officer for black students * * *." J.S. App. 72a, 73a.

[17] At this point in the litigation, the State began to speak with two voices. Although the State's Attorney General sought a stay of the district court's orders, the Governor of Louisiana also filed a brief with the district court. The Governor, on behalf of the State of Louisiana, opposed the motion to stay. See J.S. App. 81a n.2. The dispute over the State's legal representation continues before this Court. See note 5, *supra*.

and the Attorney General on behalf of the State (No. 89-556). *Id.* at 2a.[18]

ARGUMENT

These separately docketed appeals bring before this Court the federal government's longstanding challenge to the State of Louisiana's failure to eliminate the lasting effects of its racially segregated system of higher public education. In our view, however, the action filed by the United States in 1974 did not require the convening of a three-judge district court under 28 U.S.C. 2281 (1970) (repealed 1976). As a result, the Court at this time lacks appellate jurisdiction under 28 U.S.C. 1253 and the appeals must be dismissed. *E.g., Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975).[19]

1. Appellants each invoke this Court's jurisdiction under 28 U.S.C. 1253. *E.g.*, Att'y Gen. J.S. 2-4; Southern J.S. 2; Gov. J.S. 2-4, 8-16; see note 2, *supra*. The Court has appellate jurisdiction over this appeal under Section 1253 only if the action filed by the United States required the convening of a three-judge court under 28 U.S.C. 2281 (see note 3, *supra*). *E.g., Weinberger* v. *Salfi*, 422 U.S. at 763 n.8; see *Norton* v. *Mathews*, 427 U.S. 524, 531 (1976). In its complaint, the United States alleged that, "[a]cting pursuant to Louisiana law and usage," appellants "have established and perpetuated dualism based upon race in the operation of state institutions of higher education by

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[18] On September 29, 1989, the Governor of Louisiana, also on behalf of the State, filed a separate notice of appeal in No. 89-771. See J.S. App. 210a-212a.

[19] Because resolution of the jurisdictional issue will determine the forum in which litigation of this case will proceed, and in light of the importance of an expeditious decision on the merits of the underlying controversy, we urge the Court not to postpone ruling on that issue.

constructing and maintaining institutions of higher learning designed to serve students of a particular race." J.S. App. 159a. The complaint further alleged that the institutions maintained explicitly racial admissions policies before 1953. *Id.* at 160a-161a. Thereafter, the complaint charged, "[t]he acts and practices of [appellants] * * * maintain[ed] and perpetuate[d] an unlawful dual system of higher education based upon race," *id.* at 162a, and appellants "failed in their affirmative duty * * * to eliminate the vestiges of the dual system," *ibid.*

As relief, the complaint sought an order enjoining appellants from maintaining their segregated system and an order requiring them "to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana." J.S. App. 163a. Since the complaint raised a substantial constitutional challenge to the State's practice and policy and sought widespread injunctive relief, the United States requested (and received) a three-judge court under Section 2281, as then construed by the Fifth Circuit in *Sands* v. *Wainwright*, 491 F.2d 417, 421-423 (1973) (en banc), cert. denied, 416 U.S. 992 (1974). See J.S. App. 185a-196a. This Court's intervening decisions in *Morales* v. *Turman*, 430 U.S. 322 (1977), and *Costello* v. *Wainwright*, 430 U.S. 325 (1977), however, rejected the *Sands* court's construction of Section 2281, and thus establish that the action filed by the United States did not require the convening of a three-judge court. Accordingly, the Court at this time lacks jurisdiction over these appeals under 28 U.S.C. 1253.[20]

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[20] None of the parties, including the United States, ever requested the district court to reconsider the propriety of convening a three-judge panel, although alerted to that issue by Chief Judge Brown's

In *Morales* v. *Turman, supra*, plaintiffs raised constitutional challenges to a state agency's practices concerning the custodial supervision of juveniles. In ordering the convening of a three-judge court under Section 2281, the Fifth Circuit concluded that Congress had not drawn a distinction between challenges to state "regulations" as opposed to challenges to state "practices." *Morales* v. *Turman*, 535 F.2d 864, 872 (1976). This Court, however, rejected that conclusion, expressly holding that a challenge to statewide practices did not call for the convening of a three-judge court under Section 2281:

> In construing § 2281, this Court has concluded that the three-judge court procedure is brought into play in any "suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' " *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). We have never, however, considered the generalized, unwritten practices of administration to be equivalent to the "delegated legislation" of an administrative board.

430 U.S. at 323. And in *Costello* v. *Wainwright, supra*, this Court made clear that "the applicability of § 2281 as written turns on whether a state statute is alleged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes." 430 U.S. at 326.

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initial order. See J.S. App. 197a-198a. Nor did the district court address the issue, other than in a brief statement in its 1988 liability opinion. See *id.* at 10a ("Plaintiff having properly requested a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge court was convened.").

By its terms, the complaint here alleged that appellants had maintained segregated public colleges, in violation of Title VI and the Fourteenth Amendment, and sought an injunction against various acts, practices, and derelictions in duty on the part of appellants that had perpetuated the racially segregated school system. See J.S. App. 153a-165a. But as this Court made plain in *Morales* v. *Turman*, 430 U.S. at 323-324, a constitutional challenge to a state actor's practice is not equivalent to the type of action seeking to enjoin implementation (or enforcement) of an allegedly unconstitutional state statute that calls for a three-judge court under Section 2281. Unless the former lawsuit specifically seeks to enjoin operation of state law, the Court explained, it does not meet the threshold requirements of jurisdiction under Section 2281. See *Morales*, 430 U.S. at 322-323.

To be sure, the district court did enjoin the continued existence of the State's four-board structure—a system created by Louisiana state law—on the ground that this structure had facilitated the perpetuation of illegal separation. See J.S. App. 63a; see pp. 11-12, *supra*. However, no party to this action ever alleged that the statutory scheme creating the governing boards was unconstitutional and the district court itself did not suggest that the state laws creating that structure were enacted (or maintained) for racially discriminatory purposes.[21] Accordingly, since the

[21] Although the complaint set forth the Louisiana state statutes that had originally required explicit racial segregation on each of the State's college campuses (see J.S. App. 159a-162a), the complaint, by its terms, did not seek to enjoin those laws. Indeed, the State conceded that it had long abandoned implementation of those statutes. See *id.* at 4a-5a. In any event, a constitutional challenge to those laws would not have supported the convening of a three-judge court under Section 2281. Patently unconstitutional statutes do not present substantial constitutional issues requiring a three-judge panel. See, *e.g.*, *Goosby*

complaint here, like those in *Morales* and *Costello*, challenged state officials' illegal practices taken within their authority under state law, and since the only state laws affected by the district court's remedial orders were not specifically challenged in this action, the convening of a three-judge court was unwarranted.

2. The State seeks to avoid *Morales*' holding by claiming that "[t]his case, unlike *Morales*, does not involve challenged, unwritten practices of administration. * * * Here state officials have acted under written authority, both statutory and constitutional." Gov. J.S. 15 (internal quotation marks and citation omitted). But no party in *Morales* contended that state officials were operating the state facility without statutory authorization; rather, plaintiffs there, as here, alleged that state officials were exercising their authority in an unconstitutional manner. See *Morales*, 430 U.S. at 322-323.[22]

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v. *Osser*, 409 U.S. 512, 518 (1973); *Bailey* v. *Patterson*, 369 U.S. 31, 33-34 (1962).

[22] An attempt to distinguish *Costello* is similarly ill-fated. As we have stated, see pp. 14-15, *supra*, and contrary to the State's assertion, the complaint here plainly did not "alleg[e] that the implementation of Louisiana statutes and sections of the Louisiana Constitution violated Title VI and the Fourteenth Amendment." Gov. J.S. 16.

The State also claims (Gov. J.S. 13-14) that the district court's remedial orders' possible effect on officials' actions mandated by state statute required the convening of a three-judge court. That claim is meritless. In *Costello*, this Court expressly held that "[t]he applicability of § 2281 * * * [does not] turn[] * * * on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes." 430 U.S. at 326. Indeed, the State would have the Court now ignore the very pitfalls of that approach identified in *Costello*. As the Court there explained, "[t]o hold otherwise would require the postponing of the threshold question of jurisdiction until the merits of the controversy had been fully resolved and the broad outlines of

In any event, the State's submission, if accepted, would vitiate the holdings in both *Morales* and *Costello*, and would have rendered the convening of a three-judge court under Section 2281 a routine, rather than an extraordinary, event. State officials can only take state action when they act under color of some state law. Congress assuredly did not intend such a commonplace factor, capable of being alleged in every action brought against state officials, to satisfy the requirements for convening a three-judge court under Section 2281. In sum, under the circumstances presented, this Court lacks jurisdiction over each of the appeals under 28 U.S.C. 1253 and should dismiss those appeals for want of jurisdiction.

In recognition of the jurisdictional obstacle, the State, in filings by both the Governor and the Attorney General, has filed separate notices of appeal to the Fifth Circuit. Southern has filed its own notice of appeal to that court, as has the United States. See 89-771 J.S. App. 209a.[21] Sound judicial administrative practices further confirm that appellate review over this case should proceed first in the court of appeals. Courts of appeals have considered and decided cases raising similar issues in the context of challenges to state higher education systems. See *United States* v. *Alabama*, 828 F.2d 1532 (11th Cir. 1987), cert. denied, 108 S. Ct. 2857 (1988); *Geier* v. *University of Tennessee*, 597 F.2d 1056 (6th Cir.), cert. denied, 444 U.S. 886 (1979). Indeed, the Fifth Circuit is currently reviewing the federal government's appeal from a district court's judgment that the State of Mississippi had complied with its affirmative duty under Title VI to dismantle a segregated

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equitable relief discerned. Section 2281 embodies no such wasteful and uncertain mandate." *Ibid.*

[21] We will challenge the district court's order requiring the merger of the Southern and LSU Law Centers.

higher education system. See *Ayers* v. *Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), appeal pending, No. 88-4103 (5th Cir.) (argued May 1, 1989).

CONCLUSION

The appeals should be dismissed for lack of jurisdiction under 28 U.S.C. 1253.

Respectfully submitted.

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